No. 82-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARJORIE LOUISE DABNEY,
Petitioner,

vs.

MONTGOMERY WARD & CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals in the proper scope of appellate review, may reverse a Judgment, upon a jury verdict, based upon their finding that the District Court abused its' discretion in denying defendant's request to amend its witness list?

CITATIONS

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The respondent, Montgomery Ward & Co., Inc., respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is

reported at 692 F.2d 49. The Opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1982. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 19, 1982. A petition for a writ of certiorari was filed on March 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RULE INVOLVED

The Respondent adopts the statement of the rule involved contained in the petition at pages 2-3.

STATEMENT OF THE CASE

Invoking Federal jurisdiction under 28 U.S.C. §1332, Petitioner Marjorie Louise Dabney filed this action in the United States District Court seeking damages for serious injuries she sustained in a fire. Petitioner claimed that the fire was caused by defects in a heater sold by Res-

pondent; Respondent denied the defect was the proximate cause and suggested that the fire was caused by Petitioner's falling asleep as she smoked a cigarette while under the influence of alcohol.

By consent of the parties, pursuant to 28 U.S.C. §636(c), a United States Magistrate conducted all proceedings in this matter. At the start of the trial, immediately before jury selection was to begin, counsel for Respondent requested leave to call a witness who had not been identified on Respondent's witness list. Both parties had been required to list their trial witnesses by the Final Pretrial order entered pursuant to Rule 16, Federal Rules of Civil Procedure. Respondent's counsel stated he had learned of the identity of this witness from one of Respondent's employees on the morning of the trial.

After a 6-day trial, the District Court entered judgment for Petitioner, upon the jury's verdict, for $1,000,000, plus interest and costs. The Court denied Respondent's Motion for a New Trial, under

Rule 59, Federal Rules of Civil Procedure, which was based in part upon its request for leave to allow testimony from the "newly discovered" witness and Respondent's argument that it should not be penalized due to the Petitioner's failure to testify truthfully at her pre-trial discovery deposition.

In its Opinion denying Respondent's Motion, the Court specifically held that "no bad faith" on the part of Respondent's counsel was involved regarding the newly discovered witness (Pet. App. 13a). This ruling was consistent with its trial rulings that the request was not a trial tactic (Pet. App. 26a) and that the request was made in good faith (Pet. App. 23a).

The United States Court of Appeals for the Eighth Circuit reversed the District Court's judgment on the basis that the District Court had "abused its discretion in denying defendant's request to amend its witness list ...and in refusing thereafter to grant defendant a new trial" (Pet. App. 8a). This ruling of the Court

of Appeals was made upon review and taking into full consideration the probative nature and relevance of the excluded testimony, the prejudice to the Respondent from the denial of the request, the prejudice to the Petitioner had the request been granted and the impact the modification would have had on the administration of the case.

Respondent must take exception to that portion of Petitioner's statement of facts which refers to matters not on the record.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly applied established legal principles to the facts of this case. Its decision does not conflict with any decision of this Court and is consistent with decisions of other courts of appeal. The issues involved are limited to this particular case and set of facts and any decision will affect few other than the Petitioner. Accordingly, further review by this Court is not warranted.

Petitioner set forth certain selected facts, some of which are not part of any record, concerning this case in her "Statement of the Case". These facts as recited by Petitioner omitted many relevant matters. This entire appeal centers around the fact that the Respondent did not list a newly discovered witness on its Pre-Trial witness list. The list of witnesses was to be prepared by both parties pursuant to a Pre-Trial Order. The unlisted witness was discovered by Respondent on the first day of trial and the Court and Petitioner were promptly advised of her identity. Both sides, Respondent and Petitioner, interviewed the witness in question on the very same day.

The newly discovered witness would have testified as to the Petitioner's smoking habits and other activities on the date of the incident. This testimony would have supported the Respondent's theory of the case, weakened the Petitioner's theory and would have also raised issues concerning the Petitioner's credibility. Thus the

District Court ruled that the testimony of the newly discovered witness "Certainly ....would have been relevant" (Pet. App. 26a). However, irrespective of this ruling, the District Court excluded the testimony and denied the Respondent's request for a new trial on the sole basis that the disclosure of the witness was "untimely". It was this ruling that the Eighth Circuit found to be an abuse of discretion.

It must also be noted that the Respondent had no reason to doubt the Petitioner's deposition testimony, that she had worked until after 6:00 p.m. and went directly home from her place of employment, and thus had no reason to conduct a survey of every bartender in the Petitioner's hometown to refute her testimony. The Petitioner's true activities on the date of the incident were solely within her possession and were never disclosed until the accidental discovery of the new witness.

The United States Court of Appeals for the Eighth Circuit did not, as Petitioner alleges, base its conclusion on its own

behalf or evaluation of the evidence. Rather, the Court examined the relevance and materiality of the potential testimony, the circumstances surrounding its discovery, and the issues of diligence and bad faith as required by Edgar v. Finley, 312 F.2d 523 (8th Cir., 1963). The Eighth Circuit found:

> "The relevance and materiality of the testimony of Ms. Ballard is obvious. It could well have produced a different result had the jury been permitted to hear it, particularly in light of the 'speculative' explanation of the cause of the fire as given by plaintiff's expert witnesses. The sole ground upon which the magistrate refused to permit defendant to amend its witness list as requested shortly before jury selection was to commence and to allow the proferred testimony was that the request was 'untimely', in that it would be 'grossly unfair' to plaintiff 'no matter what the reason' for defendant's late discovery of the witness. Defendant's diligence in discovering the witness was not then questioned by the magistrate nor, for that matter, by the plaintiff." (Pet. App. 6a).

This "no matter what the reason" stan-

dard for the Trial Court's denial of Respondent's use of the witness was clearly the touchstone of the decision.

The Court of Appeals also considered the ability of the parties to cure any prejudice and the effect that any modification would have had upon the orderly and efficient administration of the case. The Eighth Circuit found:

> "Defendant's offer to make its newly discovered witness available for deposition at the courthouse was ignored. Instead, the primary ground of plaintiff's objection that she would be prejudiced if the requested amendment of its witness list were allowed was that the late disclosure of the witness deprived her counsel of any opportunity 'to interview other witnesses with whom plaintiff may have been associating before she went to her home."... It would appear, in light of plaintiff's sworn insistence that she was in the North Hill Tap continuously until after 6 p.m. ...when she left for home, the principal witness who could have corroborated her would have been Jack Mercer (whose failure to testify is not explained of record). Any patron of the tavern who could remember (four years after the event)

when and how plaintiff left that evening would, if available, be known either to plaintiff or to Mercer. So, too, we are not advised of any reason why either one of the three attorneys who were at the trial or any other associate of (or investigator for) the law firm could not have interviewed any witness who conceivably might have knowledge supportive of plaintiff's testimony. We note that the trial of this case extended over a period of more than a week." (Pet. App. 6a-7a).

The Court further held that:

"In the present case, the new evidence was discovered before the trial commenced, so that the time and expense of a new trial could have been avoided had the evidence been allowed or a continuance been granted had plaintiff requested one." (Pet. App. 7a).

Thus, the Eighth Court took into full consideration all of the standards listed in both Edgar, supra and United States v. First National Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981) as listed by Petitioner in her brief.

The right of the Court of Appeals to review a lower court's ruling to consider

whether there was an abuse of discretion, with respect to the exclusion of certain evidence, is undeniable. There are, however, certain standards which are to be considered and applied. In addition to those listed above, the Third Circuit Court of Appeals applied a flexible standard when it stated in DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201 (1978):

> "The applicable standard of review to determine whether the district court abused its discretion in excluding testimony for failure to comply with pre-trial notice requirements was recently stated by the court in Meyers v. Pennypack Woods, 559 F.2d 894 (3d Cir. 1977). In that case, this court reversed the district court's refusal to admit testimony of a witness not named in a pre-trial memoranda on the basis of four factors:
>
> 1. the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
> 2. the ability of that party to cure the prejudice;
> 3. the extent to which waiver

of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;

4. bad faith or willfulness in failing to comply with the court's order."

The Fifth Circuit has even noted the necessity of flexibility when it said in Davis v. Duplantis, 448 F.2d 918, 921 (1971):

"Rule 16, of the Federal Rules of Civil Procedure, permitting pretrial procedures, can achieve its purpose of improving the quality of justice only if the pretrial requirements entered at the discretion of the trial court are applied with intelligent flexibility, taking into full consideration the exigencies of each situation."

Later, that same Court acknowledged that the unanticipated oftentimes occurs. That Court, in Wallin v. Fuller, 476 F.2d 1204, 1209 (1973), said:

"Even though the parties have the advantage of discovery before the pre-trial conference, events not anticipated at the pre-trial stage

may often occur at the trial. See Clark, To an Understanding Use of Pre-Trial, 29 F.R.D. 454, 459 (1961); Clark v. United States, 1952, D.Or., 13 F.R.D. 342, 345-346. And attorneys would be reluctant to enter agreements at the pretrial conference if later amendments were strictly forbidden."

The Seventh and Ninth Circuits have also adopted similar or like standards to DeMarines, supra. Spray-Rite Service Corp. v. Monsanto, 684 F.2d 1226 (7th Cir. 1982); United States v. First National Bank of Circle, 652 F.2d 882 (9th Cir. 1981).

Clearly, it was the Trial Court's "no matter what the reason" rigid application of Federal Rule of Civil Procedure 16, in and of itself, that constituted an abuse of discretion and demanded a reversal. For, as the Court of Appeals held,:

"On the premise of the magistrate's ruling, a party could never obtain a new trial on the ground of post-trial newly discovered evidence either under Rule 59 or under Rule 60(b)(2), FRCP. Granted that 'a motion for new trial on the ground of newly discovered evidence is viewed with disfavor' (Edgar v.

Finley, 312 F.2d 533, 536 (8 Cir. 1963), a denial of such a motion is nevertheless reversible if the trial court abused its discretion." (Pet. App. 7a).

It cannot be argued, as Petitioner has claimed, that the "Court of Appeals here failed to give proper deference to the District Court's determination" (Pet. 7) or that the "decision undermines the efforts of the District Courts to monitor more tightly the conduct of civil litigation, and authorizes the disregard of pretrial orders to the detriment of the sound and orderly administration of justice." (Pet. 5).

For did not the Court of Appeals, after reciting the facts, preface their opinion by reciting their position to be one of deference to the Trial Court:

"..a district court may exclude from evidence at trial any matter which was not properly disclosed in compliance with the Court's pre-trial order, and such a ruling will be reversed on appeal only for abuse of discretion." Iowa-Mo. Enterprises, Inc. v. Avern, 639 F.2d 443, 447 (8 Cir. 1981);

Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-98, (8 Cir. 1978). (Pet. App. 5a).

It should also be noted that the Court of Appeals concluded their opinion by stating:

> "We do not underestimate the importance of requiring timely compliance with pre-trial orders. On the other hand, a trial court should not adhere blindly to the letter of the order 'no matter what the reason' for a party's non-compliance."

As stated above, Petitioner claims the Court of Appeals' decision failed to give proper deference to the District Court's management prerogatives. What the Petitioner conveniently neglected to mention was that she disregarded the Court's Order on the disclosure of witnesses. One week after the commencement of trial, not prior to trial, Petitioner filed her witness list. (Resp. App. 3a).

She now comes to this court complaining of something she likewise had a duty to comply with but chose instead to ignore. Furthermore, she claimed prejudice

by her unavailability to interview the witness. Yet, on the very same day, the Respondent learned of the witness, Petitioner had already obtained a statement from her. (Resp. App. 1a-2a)

Finally, it has never been contested that this was truly a newly discovered witness. Therefore, this particular case differs from the usual "abuse of discretion" line of cases. As the Appellate Court stated:

> "In the usual situation in which the district court was held not to have abused its discretion in excluding the testimony of a witness who was not listed or otherwise timely identified (e.g. Case v. Abrams, 352 F.2d 193, 196 (10 Cir. 1965), '(t)he witness was not newly discovered, nor was the nature of his testimony first disclosed after the pre-trial order.' No such situation is here present." (Pet. App. 5a).

Furthermore, the Appellate Court noted and held that:

> "...the magistrate expressly exonerated defendant from any implication of bad faith in failing to 'timely list the witness and found

that such failure was not a trial tactic." (Pet. App. 7a).

CONCLUSION

For the reasons stated above, a writ of certiorari should not issue as no further review by this Court is warranted.

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(BALLARD STATEMENT)

(Tr. p. 31)

BY MR. SCHULTE:

Q. Mrs. Ballard, do you remember when I came to talk to you? A. Yes.

Q. Where did we talk at? A. In the kitchen.

Q. At your house? A. Yes.

Q. What time of day was that? A. It was after-- had to be after I got off work because I work six days a week?

Q. Was that during the week? A. Yes.

Q. Could that have been in September of 1981? A. It could have been. These dates are just fouling me up.

Q. If I could produce for you a statement -- Well, let me ask you this. Did I take a statement from you that day? A. Yeah, you wrote it down on paper.

Q. Okay. And this was based on our conversation? A. Uh-huh.

Q. Did you read it over or did I read it to you? A. You read it.

Q. Was that because of my handwriting? A. I think so.

(Tr. p. 32)

Q. After we were through did you have any corrections to make at the time? A. I don't think so.

Q. Did I ask you to sign and date that statement? A. I signed it, yeah.

Q. Do you recall that we put a date on that? A. Yeah, but I can't remember what the date was.

Q. Okay, but you do recall that we did date that? A. Yes.

Q. If I now told you that that date was September 14th, 1981, would that be consistent with your memory? Is it possible that that was September 14th, 1981? A. It's possible.

* * *

On the 21st day of September, 1981, there was filed in the U. S. District Court for the Southern District of Iowa:

PLAINTIFF'S WITNESS LIST

COME NOW the undersigned, J. Bryan Schulte, Steven J. Crowley and William Bauer, attorneys for Plaintiff herein, and submit the following list of witnesses.

1. Marjorie Louise Dabney
2. Louise Lawler
3. Connie Rourke
4. William Ell
5. Rex Mundt
6. Edward McClean
7. Dr. Jerry Hall
8. Dr. Bruce Johnson
9. Joyce Wilson
10. Dr. Albert Cram